

STATE OF MICHIGAN
COURT OF APPEALS

ANGELO MAURICE HARRIS, Personal
Representative of the Estate of ANDREA
HARRIS, Deceased,

Plaintiff-Appellant,

v

ANITA WEAVER,

Defendant-Appellee.

UNPUBLISHED
August 17, 2006

No. 265617
Wayne Circuit Court
LC No. 04-403563-NI

ANGELO MAURICE HARRIS, Personal
Representative of the Estate of ANDREA
HARRIS, Deceased,

Plaintiff-Appellant,

v

SUBURBAN MOBILITY AUTHORITY FOR
REGIONAL TRANSPORTATION (SMART),

Defendant-Appellee.

No. 265618
Wayne Circuit Court
LC No. 03-337242-NI

Before: White, P.J., Whitbeck, C.J., and Davis, J.

WHITBECK, C.J. (*concurring*).

I concur in the majority opinion. I write separately to provide an outline of an alternative method by which to affirm the trial court's decision.

I. Overview

The circuit court agreed that there was no genuine issue of material fact that plaintiff's decedent, Andrea Harris, was more than 51 percent negligent, thus precluding plaintiff Angelo Maurice Harris from recovering damages as a matter of law. Therefore, the circuit court did not rule on defendants' argument that plaintiff's claims were barred under the governmental immunity doctrine. Defendants' now reassert that argument on appeal as an alternative ground

for affirmance, and, in my opinion, dismissal on that ground is another appropriate course of action in this case.¹

II. The Motor Vehicle Exception to Governmental Immunity

As a transportation authority, SMART is a governmental agency entitled to governmental immunity.² When a governmental agency engages in a governmental function, such as providing public transportation, it is immune from tort liability, unless the activity falls within one of the statutory exceptions to the governmental immunity act.³ Under the “motor vehicle” exception, a governmental agency is liable for bodily injury “resulting from the negligent operation by any . . . employee of the governmental agency, of a motor vehicle” owned by the governmental agency.⁴ The term “motor vehicle” includes a bus.⁵

The majority concludes that “reasonable jurors could conclude that [the bus driver, Anita Weaver,] was herself negligent in failing to see Harris’ vehicle and in failing to take evasive action, and the circuit court erred to the extent it concluded otherwise.”⁶ However, the mere involvement of a motor vehicle is not sufficient to abrogate immunity.⁷ The narrow construction of the motor vehicle exception⁸ requires that the plaintiff’s injuries “result from” the government-owned vehicle’s involvement.⁹

The “result from” requirement is satisfied if the government-owned vehicle physically and directly causes the incident that results in injury.¹⁰ That is, the motor vehicle exception does not apply unless there is physical contact between the government-owned vehicle and that of the plaintiff, either by the government-owned vehicle hitting the plaintiff’s vehicle or by the government-owned vehicle physically forcing the plaintiff’s vehicle off the road or into another vehicle or object.¹¹ It is important to note that “the statute does not say that governmental

¹ That is, I conclude that the circuit court reached the correct result, dismissal, albeit for the wrong reason. *Tipton v William Beaumont Hosp*, 266 Mich App 27, 37-38; 697 NW2d 552 (2005).

² MCL 691.1401(b), (d), and (f); MCL 691.1407(1).

³ See *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 620; 363 NW2d 641 (1984).

⁴ MCL 691.1405.

⁵ *Stanton v Battle Creek*, 466 Mich 611, 618; 647 NW2d 508 (2002).

⁶ Ante at ____.

⁷ See *Peterson v Muskegon Co Bd of Road Comm’rs*, 137 Mich App 210; 358 NW2d 28 (1984).

⁸ *Chandler v Muskegon Co*, 467 Mich 315, 320; 652 NW2d 224 (2002).

⁹ MCL 691.1405; *Robinson v Detroit*, 462 Mich 439, 456; 613 NW2d 307 (2000).

¹⁰ *Curtis v City of Flint*, 253 Mich App 555, 561-562; 655 NW2d 791 (2002).

¹¹ *Id.* at 562 (“Accordingly, we conclude that the trial court correctly read *Robinson* to require that the emergency vehicle at issue here be physically involved in the collision that caused plaintiff’s injuries, *either by hitting plaintiff’s vehicle* or by physically forcing that vehicle off the

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agencies are liable for injuries or property damage ‘proximately caused’ by the negligent operation of a motor vehicle. Rather, the statute says the injuries or property damage must result from the negligent operation of a motor vehicle.”¹²

Here, although there was clearly physical contact between the bus and Andrea Harris’ Avalanche, I cannot conclude that the bus was the direct cause of the incident that resulted in Andrea Harris’ death. In my opinion, Andrea Harris’ demise did not “result from” the direct conduct of the bus. The bus did not hit the Avalanche. And Andrea Harris was not physically required to travel into the oncoming lanes of traffic by the alleged negligent operation of the bus. Andrea Harris’ death resulted from the direct conduct of her inexplicable travel across multiple lanes of traffic into oncoming traffic and colliding with the bus.¹³

The majority points out, “No case has held that the ‘resulting from’ language is not satisfied in a situation where there was physical contact between the plaintiff’s vehicle and the government vehicle. Nor has any case required that the operation of the governmental vehicle be the cause of plaintiffs own contributing negligence.”¹⁴ I completely agree with the first point—case law expressly holds that there must be physical contact.¹⁵ Regarding the second point, I agree as well. No case has required that the operation of the governmental vehicle be the cause of the plaintiff’s own contributing negligence. But, in my opinion, under *Robinson* and *Curtis*, the government vehicle has to be, essentially, the offending vehicle—the hitter, rather than the hittee. In *Curtis*, this Court explicitly stated that to be liable the government vehicle must be “physically involved in the collision that caused plaintiff’s injuries, . . . by hitting plaintiff’s vehicle”¹⁶ Similarly, in *Robinson*, the Michigan Supreme Court explicitly stated that to be liable the government vehicle must “hit the fleeing car.”¹⁷ In both statements, the courts refer to the government vehicle as being the acting entity that hits the non-government vehicle. Thus, to be liable, the government vehicle must hit the plaintiff’s vehicle—the government cannot be liable simply where the plaintiff’s vehicle hits the government vehicle.¹⁸ To hold that there

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road or into another vehicle or object.”) (emphasis added); *Robinson, supra* at 445, 456-457 (“Given the fact that the motor vehicle exception must be narrowly construed, we conclude that plaintiffs cannot satisfy the ‘resulting from’ language of the statute where the pursuing police vehicle *did not hit the fleeing car* or otherwise physically force it off the road or into another vehicle or object.”) (emphasis added).

¹² *Robinson, supra* at 457 n 14.

¹³ See *Curtis, supra* at 562.

¹⁴ Ante at ____.

¹⁵ *Curtis, supra*; *Robinson, supra*.

¹⁶ *Curtis, supra* at 562 (emphasis added).

¹⁷ *Robinson, supra* at 445, 456-457 (emphasis added).

¹⁸ The only situation that I can think of where the government could *possibly* be liable as the hittee is where evidence demonstrated that the driver of the government vehicle intentionally pulled out in front of an oncoming vehicle when the government driver knew or should have known that the outcome would be that the other vehicle would hit the government vehicle.

should be liability because the government vehicle, like the bus here, failed to take evasive action “would be more in accord with a proximate cause ‘but for’ analysis.”¹⁹

Thus, I would conclude that dismissal of defendant SMART was appropriate because, under the narrow application of the motor vehicle exception, Andrea Harris’ death did not “result from” the negligent operation of the bus.

III. Governmental Employee Immunity

With respect to the claims against the bus driver, Anita Weaver, the governmental employee exception to governmental immunity provides that the employee of a government agency who is acting within the scope of his or her authority while exercising a governmental function may be liable for grossly negligent conduct that is “the proximate cause of the injury or damage.”²⁰

“‘Gross negligence’ means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.”²¹ “[E]vidence of ordinary negligence does not create a material question of fact concerning gross negligence. . . . To hold otherwise would create a jury question premised on something less than the statutory standard.”²² Accordingly, I conclude that reasonable jurors could not honestly reach different conclusions regarding whether Weaver’s conduct constituted gross negligence; thus, summary disposition was warranted on this ground alone.²³

I find it necessary, however, to also address the majority’s statement of the general principal that “[t]here may be more than one proximate cause of an accident, and it is not essential to recovery that the defendant’s negligence be the sole proximate cause of an accident.”²⁴ In the context of government employee immunity, to be “the proximate cause” of an injury, the government employee’s conduct must be “the one most immediate, efficient and direct cause preceding an injury, not ‘a proximate cause.’”²⁵

In my opinion, the most immediate, efficient, and direct cause of Andrea Harris’ death was her unexplained trajectory across multiple lanes of traffic. Thus, I would conclude that dismissal of defendant Weaver was appropriate because, under the government employee

¹⁹ *Robinson, supra* at 457 n 14.

²⁰ MCL 691.1407(2).

²¹ MCL 691.1407(7)(a).

²² *Maiden v Rozwood*, 461 Mich 109, 122-123; 597 NW2d 817 (1999).

²³ *Stanton v Battle Creek*, 237 Mich App 366, 375; 603 NW2d 285 (1999), *aff’d* 466 Mich 611 (2002).

²⁴ Ante at ___, citing *Orzel v Scott Drug Co*, 449 Mich 550, 556-557; 537 NW2d 208 (1995).

²⁵ *Robinson, supra* at 446, 458-459, 462.

exception, Weaver's conduct did not amount to gross negligence nor was her conduct the proximate cause of Andrea Harris' death.

In sum, I would affirm the circuit court's dismissal of plaintiff's claims on the alternative ground of governmental immunity.

/s/ William C. Whitbeck